SUPREME COURT, U. S.
MAR 15 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1064

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, PACIFIC WESTBOUND CONFERENCE, PACIFIC-STRAITS CONFERENCE, PACIFIC/INDONESIAN CONFERENCE, and Their Respective Member Lines, and STATE OF CALIFORNIA,
Respondents.

Opposition of Respondent State of California to Petition for Writ of Certiorari

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I.

QUESTION PRESENTED

Respondent State of California, appearing here on behalf of its agency, the San Francisco Port Authority, takes issue with the question presented by petitioner on the ground the question omits an important element inherent in the decision of the Federal Maritime Commission and affirmed in the decision of the Court of Appeals. Both deci-

sions found lawful a practice of the steamship carriers providing for equalization of inland transportation rates from one port in the San Francisco Bay area complex to another port in the San Francisco Bay area complex. The question as presented by petitioner would lead this Court to believe the Commission and the Court of Appeals had approved all equalization practices. This is not a fact; equalization permitted by the Commission's decision is limited to a unified geographical area.[1]

II.

BASIS UNDER RULE 19 WHY WRIT OF CERTIORARI SHOULD NOT ISSUE

There is no conflict in decisions between the Court of Appeals on the same matters, nor is the decision of the Federal Maritime Board in an earlier case inconsistent with its decision in this case. Petitioner in stating his question appears to indicate such conflict exists. He cites two decisions, one by the Federal Maritime Board and one by the Court of Appeals of the District of Columbia. Both decisions grew out of the same proceeding. The Federal Maritime Board decision, reported in *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), arose on a complaint of the City of Portland, Oregon and the Port of Seattle, Washington, based on objection to an equalization practice which, it was claimed, diverted traffic originating in Washington, Oregon, Idaho and Montana from complainants' ports to California. In general, the Commission agreed the equalization practice complained of was improper because it did take traffic from territory

1. The opinions of the Commission and the Court of Appeals are correctly referred to in the petition and are included in its appendix. References will be made to the appropriate pages of the appendix of petitioner to avoid the necessity of reprinting.

naturally and geographically tributary to complainants to a location hundreds of miles away. The order, however, did not strike down all equalization practice. The administrative tribunal did exactly what it must do in all cases. It weighed all of the economic factors properly before it, including interests of shippers, steamship companies, commerce, and the ports. The Commission specifically held that whether diversion of traffic is unjust or unfair discrimination, or undue or unreasonable preference, is a question of fact to be determined in each specific instance (page 674). Based on this rationale, the Commission held the practice of equalization on apples, and other deciduous fruit, among the more important cargoes moving under equalization, was not improper. It also found equalization on dairy products was permissible. It further held it would keep these matters under review and when reasonably adequate service was provided from the northwest, would prohibit equalization. Some forms of equalization were prohibited by the decision. While the administrative tribunal did refer to Section 8 of the Merchant Marine Act of 1920 as an indication of a policy expressed by Congress, the Commission's decision is based on interpretations of the Shipping Act which governs its jurisdiction.

Equalization practiced between California and the northwest is quite different from equalization practiced within one harbor complex. But even if this were not so the decision is not inconsistent with the holding before this Court, because both in the Portland decision and in the instant case in determining value to the public the Commission based this decision on the same considerations as the Portland case, to wit: the interests of commerce, value to the shippers, value to the steamship companies, and the interests of the ports.

The Circuit Court opinion cited by petitioner is *Pacific Far East Line v. United States,* 246 F.(2d) 711 (C.A.D.C. 1957.) In that case one of the steamship lines before the Commission in the administrative hearing cited above, appealed from the Commission decision disapproving equalization on explosives. Originally the Board had held that equalization as to explosives from Washington to the Philippines had been justified on the ground of inadequate service and would be justified until approximately monthly sailings were available. It also found one sailing a month was adequate to meet the needs of shippers. The Board had subsequently been advised that a Dutch line would begin making monthly sailings from an anchorage outside Seattle to the Philippines. It then concluded equalization on explosives was no longer justified, except that if the shipper could not get space when needed special equalization could be made (page 714).

The Court of Appeals held the Commission's order was proper, basing its decision on Sections 15, 16, and 17 of the Shipping Act of 1916. It did not base its affirmance on Section 8 of the Merchant Marine Act, but found the Administrative Board could take that Act into consideration in considering Congressional policy. What the decision really holds is that the Administrative Board's discretion will be upheld unless an abuse of that discretion is shown. This decision, therefore, is entirely consistent with the decision of the Ninth Circuit Court of Appeals in the instant case.

It is our conclusion that the cases referred to are consistent with the present decision. In addition, the present decision concerns one geographical locality. The cases referred to above concerned equalization in widely divergent geographical areas. We conclude no ground for jurisdiction is stated under Rule 19.

III.

STATEMENT OF THE CASE

The decision of the Court of Appeals, based on the ruling of this Court in the case of *Consolo v. Federal Maritime Commission,* 386 U.S. 607 (1966), correctly held that as a reviewing court it would not substitute its judgment or discretion for that of the administrative agency (App. pp. 6-9). There was no issue of law properly before the Court. The administrative tribunal had interpreted the provisions of law before it correctly and had then rendered an order based on the sound exercise of its discretion. The Court found the order based on substantial evidence, warranted by the record and founded on a reasonable basis in law. *Stockton Port District v. Federal Maritime Commission,* 369 F.(2d) 380 (C.A. 9th, 1966).

The order of the Commission was a proper exercise of the Commission's discretion (App. pp. 10-52; 56-80). The case commenced on the complaint of Stockton, which alleged the port equalization rule resulted in diversion in volumes of cargo and was contrary to all of the Acts referred to in its petition before this Court. The Commission found the conferences had been required to and had set ocean rates identical to all terminal ports. The conferences had also set up a port equalization rule which permitted conference carriers to equalize inland transportation costs between terminal ports. In explaining equalization the Commission said:

> "For example, if from the point of origin of the cargo it will cost the shipper 34 cents per hundred pounds to ship overland by common carrier to the Port of Stockton and 42 cents per hundred pounds to ship overland by common carrier to the Port of San Francisco, the ocean carrier may take the shipment at San Francisco and 'equalize' the added inland cost by reimbursing the

shipper for the excess of 8 cents per hundred pounds which it has cost him to ship via San Francisco instead of Stockton." (App. p. 12).

The Commission points out that the conference permits transshipment. In the case of transshipment a shipper ships to the terminal and pays his own inland transportation costs. The steamship company then picks up the goods at the terminal, rehandles the goods, pays terminal costs, but actually loads the goods at another port or terminal. Terminal costs are, therefore, double. Transshipment costs the vessel approximately $6.00 to $7.50 per ton; equalization costs the vessel on the average $2.00 to $2.50 per ton. (App. p. 19). As the Commission states, it is not always convenient for vessels to actually call at Stockton. If the volume of cargo is not sufficient the call will not be warranted. It is an 8-hour trip in each direction to reach Stockton from the Bay area. There is, therefore, additional transit time, pilotage, tugs, and other expenses. Estimates of these costs range from $3000 to $4000 per voyage.[2]

Weighing these considerations, the Commission found that equalization gave a vessel latitude in loading, scheduling, and the ability to avoid uneconomical calls. Transshipment is at least three times as expensive and requires unnecessary rehandling of merchandise (App. pp. 18-19).

The Commission next discussed the testimony of the shippers, who, with but few exceptions, strongly favored equalization (App. pp. 19-20). Both the Examiner and the Commission found the equalization on citrus fruit from the Los Angeles area unjustly discriminatory and unfair. In this instance, equalization was being attempted between divergent geographical areas, to wit: Northern California

2. Other estimates were even higher. (App. p. 66).

and Southern California. No appeal was taken from this portion of the order.

On the other hand, after weighing the equities, the Commission found San Francisco and Stockton were of the same harbor complex and that equalization between ports in the same geographical area was not contrary to any of the statutes referred to by petitioner. It further found that the territory which was naturally tributary to Stockton was also tributary to San Francisco. Stockton disagreed with the latter conclusion on the ground that naturally tributary territory means the area from which inland transportation rates are less. The Commission properly found there was no such simple test of a "naturally tributary territory." The test must concern itself with the economies of transportation and natural flow of commerce. In this case the natural flow of commerce from the area Stockton sought to have delineated as its exclusive preserve, is through the Golden Gate to the Pacific Ocean. It found that San Francisco, which had been built in reliance on this traffic and had operated for almost a hundred years prior to the existence of Stockton, did not cease to be a port merely upon the creation of Stockton (App. pp. 25-26).

The Commission went extensively into the economics, pointing out the costs to the shippers, to the steamship companies, and disposing completely of Stockton's claim of hardship. In this connection it states:

> ". . ., Stockton's growth since 1957 has put it ahead of the ports of San Francisco, Oakland and Alameda combined, in export tonnage. General cargo (via conference and non-conference vessels) to conference destinations increased by over 50% in 1962 over 1961, although total cargo to conference destinations declined from 1,308,558 tons to 1,108,726 tons. Thus, equalization has not seriously affected Stockton's competitive position." (App. pp. 36-37).

Before entering its order the Commission discussed at considerable length each of the statutory provisions which petitioner raises in this writ. We find no error in its interpretation of the statutes.

The gist of the majority decision sets forth and applies the following legal test:

> ". . .: If the absorption of inland rate differentials destroys the right of ports to traffic originating in the areas naturally tributary to them, the absorption is unduly prejudicial to such ports where service from the port equalized against is adequate." (App. p. 41).

By its order the Commission finds that if the equalization rule does not go beyond the naturally tributary territory the equalization rule may be properly applied.

One Commissioner dissented from the opinion. His conclusions are not supported in the record and in our opinion are not correct interpretations of the law governing the decisions of the Commission.

IV.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

It is our position that the order and opinion are correct and, therefore, that certiorari does not properly lie.

Every statute referred to by petitioner was considered and interpreted. The basic considerations before the Commission were whether a fundamentally sound economic device created *undue* or *unreasonable* preference or advantage to any locality, or subjected any locality to any *undue* or *unreasonable* prejudice or disadvantage. (Emphasis ours.) (Section 16 First and Second of the Shipping Act of 1916; 46 U.S. Code 815, 39 Stat. 734). In making this determination the Commission took into consideration all of the rele-

vant provisions of the Shipping Act and discussed Section 8 of the Merchant Marine Act of 1920 and Section 205 of the Merchant Marine Act of 1936. This is all the Commission was either required or allowed to do under the law.

Section 8 of the Merchant Marine Act of 1920 (App. p. 2) directed the Departments of Commerce and Defense ". . . to investigate territorial regions and zones tributary to . . . ports, taking into consideration the economies of transportation by rail, water and highway and the natural direction of the flow of commerce; . . .". (46 U.S.C. 867.) The Department of Commerce in this connection acts through the Maritime Administration, not the Maritime Commission. The Maritime Administration has made its determinations pursuant to this section for the San Francisco Bay harbor complex in a series of studies, delineated on maps, introduced in this proceeding as Exhibits 47 through 50. The publication shows the tributary territory of Stockton wholly within the tributary territory of San Francisco and largely within the territory of Oakland-Alameda (App. p. 29). The Commission's conclusion, therefore, is entirely consistent with and supported by the Maritime Administration's finding under Section 8 of the Merchant Marine Act of 1920. The Commission itself may not make a finding under Section 8 and, strictly speaking, the interpretation of that statute, contrary to petitioner's contention, is not involved here. Nevertheless, the fact that the determinations are wholly consistent renders any legal question academic.

Section 205 of the Merchant Marine Act of 1936 (App. pp. 3-4) similarly does not govern these proceedings. Here again, jurisdiction is vested in the Maritime Administration, not in the Commission. All the statute purports to do is to prohibit conferences or carriers from preventing other carriers from serving federally assisted ports at different ocean rates. The ocean rates are the same. Even if equali-

zation is considered part of the rate, which it is not, it applies both to and from Stockton. While the Commission did not have the interpretation of the statute before it, it did consider and discuss this provision. (App. pp. 37-38).

There is, therefore, contrary to petitioner's statement, no Act of Congress which prohibits port equalization. On the contrary, the Federal Maritime Commission, vested with the jurisdiction of administering the Shipping Act of 1916 is required to and must weigh the relevant factors. In considering public interest, it must consider the benefits to shippers, carriers, and the public. Had it not done so it would have been in error. Congress was not required in the Shipping Act to use such terms as "undue" and "unreasonable"; it did so because it wished to have the equities weighed.

It is not true that the decision affects ports generally. The order of the Commission is limited to areas where there is a clear geographical relationship. Here again, the order of the Commission is correct. The Commission did not, contrary to the statement of petitioner, base its conclusion solely on economics. In finding equalization from the Los Angeles area to the San Francisco area improper, and equalization in the Bay area complex proper, the Commission has clearly delineated the extent of the equalization it will permit.

The Court of Appeals properly found there were no relevant questions of law before it, i.e., that the questions of law before the Commission had been properly decided by the Commission, leaving only the reweighing of the evidence. This the Court correctly decided it would not do. The Court of Appeals specifically found the Commission's conclusions had a reasonable basis in law.

CONCLUSION

We respectfully request the writ of certiorari be denied.

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